

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 05-0374
SALES AND WITHHOLDING TAX
For Tax Period 2000-2006**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning specific issues.

Issues

I. Withholding Tax –Imposition

Authority: IC § 6-8.1-5-1(b); IC § 6-3-4-8; IC § 6-8.1-5-1(a).

The Taxpayer protests the assessments of withholding tax.

II. Sales Tax –Imposition

Authority: IC § 6-8.1-5-1(a).

The Taxpayer protests the assessment of sales tax.

III. Tax Administration-Imposition of Negligence Penalty

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

The Taxpayer protests the imposition of the negligence penalty.

Statement of Facts

The Taxpayer was a corporation that operated a pest extermination service. The Indiana Department of Revenue, hereinafter referred to as the "Department," assessed additional withholding tax, interest, and penalty for the tax period 2003. The Taxpayer protested the assessments and a hearing was scheduled. Before the hearing, the Department assessed additional sales tax, interest and penalty for the tax periods ending March 31, 2006 – June 30, 2006 and additional withholding tax, interest, and penalty for the tax periods 2000 – 2001 and February 28, 2006 – June 30, 2006. At the hearing, the Taxpayer amended its protest to include the additional assessments. This Letter of Findings results.

I. Withholding Tax –Imposition

Discussion

Indiana Department of Revenue assessments are prima facie evidence that the tax assessment is correct. IC § 6-8.1-5-1(b). The Taxpayer bears the burden of proving that the assessment is incorrect. Id.

The proposed withholding tax liability was issued pursuant to IC § 6-3-4-8.

The Taxpayer does not dispute that it was required to deduct withholding tax from its employees' wages and remit that tax to the state. Rather, the Taxpayer argued that it had already remitted the assessed withholding tax. In support of this contention, the Taxpayer produced the check by which it claimed it had paid its 2003 withholding tax liability. The Department determined that the check produced by the Taxpayer had actually been used, as directed by the Taxpayer, to satisfy other outstanding liabilities that were at the Sheriff's Warrant stage. The Taxpayer made this payment to obtain a Certificate of Discharge on July 6, 2005. The withholding tax liabilities that are the subject of this protest were not at the Sheriff's Warrant stage and were not included in the liabilities that needed to be satisfied for the Department to issue the July 6, 2005 Certificate of Discharge. The Taxpayer has not satisfied the withholding tax liabilities that were the subject of this particular assessment.

There was no evidence submitted to indicate that the Taxpayer had paid the withholding assessments for the tax period 2000-2001.

The Department also assessed the Taxpayer withholding taxes for the tax periods ending February 28, 2006 and June 30, 2006. The withholding taxes were estimates. The Department issued the assessments pursuant to its authority to assess taxes based upon best information available found at IC § 6-8.1-5-1(a). The Taxpayer provided substantial information indicating that the business closed on July 31, 2005. Since the business closed on July 31, 2005, the Taxpayer does not owe any withholding taxes for tax periods after July 31, 2005.

Finding

The Taxpayer's protest of withholding taxes assessed for the years 2000-2003 is respectfully denied. The Taxpayer's protest of withholding taxes assessed for tax periods after July 31, 2005 is sustained.

II. Sales Tax –Imposition

Discussion

The Department assessed the Taxpayer sales tax for the tax periods ending March 31, 2006, and June 30, 2006. The sales taxes were estimates. The Department issued the assessments pursuant to its authority to assess taxes based upon "best information available" found at IC § 6-8.1-5-1(a). The Taxpayer provided substantial information indicating that the business closed on July

31, 2005. Since the business closed on July 31, 2005, the Taxpayer does not owe any sales taxes for tax periods after that date.

Finding

The Taxpayer's protest to the sales taxes assessed for the tax periods ending March 31, 2006, and June 30, 2006 is sustained.

III. Tax Administration-Imposition of Negligence Penalty

Discussion

The taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

The Taxpayer provided substantial documentation to indicate that the negligence penalty does not apply in this situation.

Finding

The taxpayer's protest is sustained.

KMA/BK/DK –December 1, 2006